

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION**

DARRYL COLBERT,)	
Plaintiff,)	
)	
vs.)	Case No. 05-4112-CV-C-FJG
)	
CROSSROADS CORRECTIONAL)	
CENTER, et al.,)	
Defendants.)	

**ORDER GRANTING PLAINTIFF PROVISIONAL LEAVE TO PROCEED IN FORMA
PAUPERIS, DIRECTING PLAINTIFF TO PAY FILING FEE, AND DIRECTING
DEFENDANTS TO ANSWER OR OTHERWISE RESPOND TO THE ALLEGATIONS
OF PLAINTIFF'S COMPLAINT**

Plaintiff, who is incarcerated at the Missouri State Penitentiary in Jefferson City, Missouri, has filed this case pursuant to 42 U.S.C. §§ 1983 and 1985, seeking relief for claimed violations of his federally protected rights. Plaintiff has moved for leave to proceed in forma pauperis without prepayment of court fees or costs. He has submitted an affidavit of poverty in support thereof.

Under 28 U.S.C. § 1915 (as amended April 26, 1996), a prisoner seeking to bring a civil action in forma pauperis shall be required to pay the full amount of the \$250.00 filing fee.

Pursuant to 28 U.S.C. § 1915(b)(1),

[t]he court shall assess and, when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of –

(A) the average monthly deposits to the prisoner's account; or

(B) the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.

Pursuant to 28 U.S.C. § 1915(b)(2),

(2) After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. The agency having custody of the prisoner shall forward payments from the prisoner's account to the clerk of the court each time the amount in the account exceeds \$10 until the filing fees are paid.

Although a prisoner shall not be prohibited from bringing a civil action because he has no assets and no means by which to pay the initial partial filing fee, see 28 U.S.C. § 1915(b)(4), the court shall dismiss the case at any time, notwithstanding any filing fee or any portion thereof that may have been paid, if the court determines that the allegation of poverty is untrue or that the action is frivolous, malicious, fails to state a claim, or seeks monetary relief against a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2)(A) and (B).

Plaintiff has submitted a certified copy of his inmate account which shows all deposits into and withdrawals from that account during the past six months. From November 18, 2004, through May 18, 2005, plaintiff's average monthly balance was \$79.74. Plaintiff's average monthly income was \$106.86. Pursuant to 28 U.S.C. § 1915, plaintiff will be ordered to pay an initial partial filing fee of **\$21.37**.

Plaintiff names Crossroads Correctional Center, Gary B. Kempker, Mike Kemna, Kathleen Baker, Candy Almond, Mary Carter, and Jerry Richie as defendants. Plaintiff alleges that defendants (1) conspired to violate his civil rights under 42 U.S.C. § 1985 by encouraging or causing a resident offender to assault the plaintiff; (2) violated plaintiff's rights under 42 U.S.C. § 1983 by encouraging the same resident offender to assault plaintiff by telling that resident offender that plaintiff was a prison snitch; and (3) conspired to intentionally inflict

bodily injury by encouraging the same resident offender to assault plaintiff. Plaintiff requests monetary relief.

As a preliminary matter, the United States Supreme Court has held that suits against a state and “its agencies and institutions are barred by the Eleventh Amendment.” Alabama v. Pugh, 438 U.S. 781 (1978). Therefore, plaintiff’s claims against Crossroads Correctional Center will be **SEVERED AND DISMISSED** from the cause of action, as barred by the Eleventh Amendment.

Plaintiff’s remaining claims against defendants Gary B. Kempker, Mike Kemna, Kathleen Baker, Candy Almond, Mary Carter, and Jerry Richie do not appear to be totally frivolous or maliciously raised. If the allegations of plaintiff’s complaint are proven, plaintiff has a reasonable opportunity to prevail on the merits of this action. 42 U.S.C. § 1997e(g)(2). Therefore, defendants Gary B. Kempker, Mike Kemna, Kathleen Baker, Candy Almond, Mary Carter, and Jerry Richie will be directed to answer or otherwise respond to plaintiff’s complaint.

Accordingly, it is **ORDERED** that:

(1) plaintiff is granted provisional leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915(A)(b)(1)(2);

(2) plaintiff shall pay to the clerk of the court for the Western District of Missouri, Western Division, an initial partial filing fee of **\$21.37**. If the initial partial filing fee is not received within thirty (30) days from the date of this Order, plaintiff’s case shall be dismissed without prejudice;

(3) the agency having custody of plaintiff shall forward to the clerk of the court monthly

payments of 20 percent of the preceeding month's income credited to plaintiff's account each time the amount in the account exceeds \$10 until the entire \$250.00 filing fee is paid;

(4) the clerk of the court shall forward of copy of this order to the Office of the Treasurer with the Department of Corrections;

(5) because this case is included in the Case Management/Electronic Case Filing (CM/ECF) system, plaintiff's counsel shall be responsible for electronically filing the complaint on or before **JUNE 24, 2005**;

(6) the clerk of the court is directed to issue summons and process upon plaintiff's filing of the complaint and deliver same to the United States Marshal for service upon defendants Gary B. Kempker, Mike Kemna, Kathleen Baker, Candy Almond, Mary Carter, and Jerry Richie. The United States Marshal may first attempt service by certified mail, return receipt requested; and

(7) plaintiff's claims against defendant Crossroads Correctional Center will be **SEVERED AND DISMISSED** as barred by the Eleventh Amendment to the United States Constitution.

IT IS SO ORDERED.

/s/ FERNANDO J. GAITAN, JR.
Fernando J. Gaitan, Jr.
United States District Judge

Dated: 06/22/2005.
Kansas City, Missouri.